REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-2815

EMERSON E. MARTIN

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

CHISHOLM CHISHOLM & KILPATRICK
ANGELA BUNNELL
One Turks Head Place, Suite 1100
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile
Attorney for Appellant

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APPELLANT'S REPLY ARGUMENT

I. The Board erred when it relied on inadequate examinations to deny the Veteran entitlement to a rating in excess of 20 percent. These examinations did not properly reflect the functional loss caused by the Veteran's low back disability.

The Secretary argues that "[t]he December 2014 examination is adequate and the Board provided an adequate statement of reasons or bases for denying a schedular rating in excess of 20 percent for Appellant's lumbar spine disability." Sec. Br. at 7. However, the Secretary's argument fails to demonstrate how the examinations are adequate in light of the Veteran's arguments that they did not reflect his range of motion lost due to flare-ups and repetitious movement. Apa. Op. Br. 7-10.

The Secretary contends that the Board's reference to the February 2011 examination to support its findings was not in error because, while it was deemed to be inadequate for rating purposes on its own, "at no point were the other findings of the February 2011 examination invalidated." Sec. Br. at 7. This argument is unpersuasive. The parties agreed in a March 2014 Joint Motion for Remand that the examination was inadequate. R-700. Specifically, the parties agreed "the examiner did not address to what extent if any that pain could significantly limit functional ability during flare-ups." *Id.*; *see Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (finding a "medical opinion is inadequate for disability rating evaluation [when] the examiner did not discuss whether any functional loss is attributable to pain during flareups," despite the appellants assertions of experiencing flareups). The Board reported the findings from

the February 2011 examination, but never indicated that the examination was previously declared inadequate. R-12. Therefore, despite the Secretary's suggestion, to the extent the Board relied on this examination, this was in error and nothing in the Secretary's argument demonstrates it was not.

The Secretary next asserts that "the December 2014 examination is adequate, both when read as a whole on its own, and when read together with the other two evaluations." Sec. Br. at 8. During the 2014 examination, the examiner found that pain, weakness, and incoordination experienced by the Veteran do limit his functional ability during flare-ups. R-114. He noted that Appellant's flare-ups further limited his range of motion to forward flexion from 0 to 60 degrees and that his limitation during flare-ups was mostly due to pain. *Id.* However, the examiner did not indicate where in the range of motion pain began. *Id.*; *see also Mitchell*, 25 Vet.App. at 43-44 (the examination report must reflect "at what point during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain.").

The Secretary's argument regarding the December 2014 examination also fails to address the other inconsistencies the Veteran demonstrated in his argument. Apa. Op. 9-10. The examiner's finding that there was no pain precipitated by weight bearing was contradicted by his previous report that his flare-ups were brought on by lifting objects. R-113. Nor did it address the finding that the Veteran would not be further limited after repetitive motion, but would simultaneously be unable to perform

work related tasks that required frequent or repetitive bending of the lumbar spine. R-113, 117. The Board did not address these inconsistencies. R-12-13. Nor did the Secretary. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded").

Lastly, the Secretary posits that the rating is adequate because the Veteran "explicitly denied any functional loss or functional impairment of the thoracolumbar spine regardless of repetitive use during the December 2014 examination," citing to R-113. Sec. Br. at 10. It is unclear how the Secretary draws this conclusion when the *examination report as a whole* reflects he exhibited functional impairment on repetitive use. For the question of whether the Veteran reported having functional impairment of the thoracolumbar spine, the examiner checked the box no. R-113. However, immediately preceding this notation the Veteran complained of constant pain, radiating numbness, and flare-ups that make his back stiff and less mobile after lifting objects. *Id.* The examiner further opined that the Veteran would be unable to participate in work activities requiring frequent bending. R-117. It is unclear how the Secretary can construe this as explicitly denying functional loss.

In *Thompson v. McDonald*, 815 F.3d 781, 785 (2016), the Federal Circuit determined that "it is clear that the guidance of § 4.40 is intended to be used in understanding the nature of a veteran's disability, after which a rating is determined

based on the § 4.71a criteria." Thus, in order to properly rate the Veteran's condition under the rating criteria, the Board needs a clear understanding of normal working movements of the body and of any functional loss the Veteran may have, which includes pain on movement. *See Thompson*, 815 F.3d at 785. The examiner's proper reflection of pain on motion, which contributes to functional loss, and the Board's proper interpretation of that notation, was essential to properly adjudicating the claim, as the Court has explicitly "rejected the Secretary's argument that DCs based upon limitation of range of motion already 'contemplate the functional loss resulting from pain on undertaking motion.'" *Mitchell*, 25 Vet.App. at 37 (citing *DeLuca v. Brown*, 8 Vet.App. 202, 205-06 (1995)). The examination reports in April 2007, February 2011, and December 2014 do not reflect the functional loss that the Veteran may have, therefore they are inadequate to rate his condition. Thus, remand is appropriate.

II. **The Board misinterpreted 38 C.F.R. § 3.321 (2016) when it failed to properly account for the Veteran's symptomatology**.

Mr. Martin requires the use of injections, physical therapy, and bed rest to manage his chronic pain, and experiences flare-ups precipitated by activity, the inability to walk more than 50 yards, bend frequently, and limitations on sitting and standing. R-117, 1927. The Secretary argues that "other than list these symptoms, Appellant has entirely failed to demonstrate how they make his disability exceptional or unusual as to render the rating schedule inadequate. Sec. Br. at 12. The Secretary attempts to shift the burden to the Veteran without explaining why the Board was

absolved of its requirement to discuss the Veteran's symptomatology in the first place. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014). As such, this argument is unpersuasive.

When considering the need for referral for extraschedular consideration, the Board is required to consider not just the Veteran's symptoms, but also the severity of those symptoms. *See Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The rating criteria, which only contemplates limitation of motion, does not contemplate Mr. Martin's injections for pain, bed rest during flare-ups, and limitations upon sitting, standing, or walking. Apa. Op. Br. at 12.

The Board's failure to consider the second element of *Thun* compounded its error in the first element. *See also Yancy v. McDonald*, 27 Vet.App. 484, 496 (2016) (where the Court found error in the Board's analysis regarding the first *Thun* element, the Court held that "because the Board did not reach the second *Thun* element, the Court cannot hold that the Board's error was harmless"). Had the Board conducted the proper analysis of the first step, it may have determined that the second step was necessary. The record demonstrates that due to his back pain and medication, his ability to do his job as a correctional officer was limited by his inability to run and stand. R-1927. Had the Board not misinterpreted the first step of *Thun*, it may have found that his disability produced marked interference with employment satisfying the second element of *Thun*. *See Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (finding the Board erred when denying an increased rating based on a higher standard than that

found in the relevant diagnostic code). As such, the Board's misinterpretation of 38 C.F.R. § 3.321(b)(1) prejudiced the Veteran, and remand is required for the proper adjudication of his claim.

Mr. Martin argued that the collective impact of his foot, knee, and back disabilities which combined to limit his ability to walk, climb, sit, or stand was not contemplated by the Board. Apa. Op. 13-14. The Secretary argues that "Appellant's citations in his brief…do not demonstrate a combined effect that creates an exceptional or unusual disability picture that is not already compensated by Appellant's individual disability ratings. Other than that bald assertion, the Secretary makes no persuasive argument. The Board found that "this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the Veteran for a disability that can be attributed only to the combined effect of multiple conditions." R-21. As argued in Mr. Martin's opening brief, this is a misinterpretation of the law, which the Secretary fails to address. The standard is whether the Veteran's service connected disabilities together combine to form an exceptional disability picture. *Johnson v. McDonald*, 762 F.3d at 1365. Here, his back, knees, and feet conditions combine to limit his ability to sit, stand, walk, or climb stairs. R-117; 1927.

Lastly, the Secretary argues that "Appellant's assertion that a remand of TDIU necessarily warrants a remand of his § 3.321(b)(1) claim is not persuasive in this case when the Board clearly found that the first element of *Thun* was not satisfied. Sec. Br.

at 15. In this case, Mr. Martin already demonstrated the Board's analysis as to the first step of *Thun* was inadequate. His service-connected back disability is not contemplated by the assigned schedular rating. Apa. Op. at 11-13. The Board remanded the issue of entitlement to TDIU in order to obtain an examination of all of the Veteran's service connected disabilities and their impact on his ability to secure and follow a substantially gainful occupation. R-24. This examination would contemplate the impact of his back condition on employment, and the Board did not have a complete picture of the Veteran's service-connected disability and its effect on his employability when it made its extraschedular determination. *See Brambley v. Principi*, 17 Vet.App. 20, 24 (2003). The evidentiary development ordered by the Board could also serve to produce evidence that reasonably raises the question of whether referral for extraschedular rating consideration is warranted based on the collective eimpact of the Veteran's service connected disabilities. *See Yancy*, 27 Vet.App. at 495. As such, the Board's misinterpretation of 38 C.F.R. § 3.321(b)(1) prejudiced the Veteran, and remand is required for the proper adjudication of his claim.

CONCLUSION

Mr. Martin could have been entitled to a rating in excess of 20 percent had the Board obtained an examination which properly reflected his functional loss during repetition and on flare-ups. The Board was also required to consider all of his symptoms in determining whether a referral for extraschedular consideration was

warranted. Because the Board failed to properly consider whether Mr. Martin's assigned schedular rating adequately compensated his entire disability picture and the combined impact of his service-connected disabilities, the Board erred.

Based on the foregoing reasons, as well as the arguments contained in Mr. Martin's opening brief, the Court should vacate the Board's decision and remand the appeal with instructions for the Board to readjudicate the issue of entitlement to an increased rating for his low back condition and extraschedular referral, as well as provide adequate reasons or bases for its decision, in accordance with the Court's opinion.

Respectfully Submitted,

Emerson E. Martin
By His Representatives,

/s/ Angela Bunnell
Angela Bunnell
Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile